

Respondent claims the SALJ erred in computing claimant's average weekly wage and in determining the nature and extent of claimant's right leg impairment. Respondent maintains claimant's average weekly wage should be \$320 per week. Respondent contends claimant sustained no permanent impairment to the right leg.

Claimant argues the SALJ's Award should be affirmed.

The issues for the Board to decide are:

(1) Average gross weekly wage.

(2) Nature and extent of claimant's permanent disability, if any, to the right leg.

FINDINGS OF FACT

Having reviewed the entire evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant was hired as a laborer by respondent, a framing subcontractor, in January 2010.

On December 16, 2010, claimant was working on a roof preparing to install windows. He slipped and fell 20-25 feet, landing on both feet. Claimant was immediately taken to Overland Park Regional Medical Center's emergency room (ER), where he reported severe pain. Claimant had tenderness to the lateral aspects of both feet and ankles.

X-rays taken at the ER revealed a left talar neck fracture and an open left ankle dislocation. Claimant also reported injury to his right ankle, which was also x-rayed. The right ankle x-rays evidently revealed no fracture or dislocation. The medical records indicate claimant was diagnosed, in addition to the left foot/ankle fracture, with a right ankle inversion sprain.

Also on December 16, 2010, Dr. Daniel J. Gurley, a board certified orthopedic surgeon, performed surgery, consisting of an open reduction and internal fixation of the left talas, irrigation and debridement of the left ankle, and left lateral ankle ligament repair. Claimant was taken off work and received a course of physical therapy. Claimant had not returned to work when the regular hearing was conducted on February 14, 2012.

Claimant attended follow-up appointments with Dr. Gurley for his right and left ankle injuries, as well as left knee pain, from December 23, 2010, until Dr. Gurley found claimant had reached maximum medical improvement on June 21, 2011. During that period, claimant reported symptoms to the right and left lower extremities and received conservative treatment for both.

An FCE was conducted on June 15, 2011. During that evaluation, claimant reported pain in his left foot, left ankle, left knee and right foot. The physical therapist who prepared and signed the FCE report, Isabel I. Schockey, noted claimant's "[p]ain in right ankle and

left knee have been fairly consistent throughout rehab (29 visits from 3/16 through 6/1/11)."¹ Although the FCE report concluded claimant demonstrated "[o]verreaction,"² the report also states claimant showed consistent valid effort. Ms. Schockey recommended permanent physical restrictions. When claimant was last seen by Dr. Gurley on June 21, 2011, claimant was released with restrictions.

On August 31, 2011, Dr. Gurley expressed his opinion by letter that claimant sustained a 17% permanent impairment to the left lower extremity and no impairment to the right ankle or left knee based upon the *AMA Guides*.³

At the request of claimant's attorney, Dr. Fernando Egea, board certified in neurology and other fields of medical speciality, examined claimant on July 18, 2011. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Egea and claimant communicated in Spanish.

Dr. Egea found claimant had mild edema and pain on palpation of the lateral and medial aspect of the talas bone fracture site and limited range of motion of the left ankle. Dr. Egea also found pain on palpation of the medial and lateral aspects of the right calcaneous and right talas bones and the right maleolus. Dr. Egea opined claimant's left and right ankle injuries were directly related to his accident on December 16, 2010. Dr. Egea imposed permanent work restrictions.

Based on the *AMA Guides*, Dr. Egea opined claimant sustained an 18% permanent impairment to the left lower extremity. The doctor also rated claimant's right lower extremity at 16% permanent impairment.

Dr. Michael Poppa, board certified in occupational and preventive medicine, examined claimant on February 3, 2012, at respondent's request. The doctor reviewed claimant's medical records, took a history and performed a physical examination. An interpreter was present at this examination.

Based on the *AMA Guides*, Dr. Poppa opined claimant sustained an 18% permanent impairment to the left lower extremity. Dr. Poppa rated claimant's right leg at 0%.

¹ Gurley Depo., Ex. 2 at 24. The reference is to physical therapy sessions.

² *Id.*

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

Dr. Poppa opined claimant's accident at work for respondent was the direct and proximate cause of, or substantially contributed to, claimant's right and left lower extremity injuries.

Claimant testified he experienced pain in both feet, both ankles, both knees, and occasionally in the back.

Other evidence is summarized in the analysis and conclusions below.

ANALYSIS AND CONCLUSIONS OF LAW

1. Claimant's average weekly wage was \$810 per week.

Claimant testified he worked for respondent 35-55 hours a week at \$18 an hour, or \$810 per week (45 hours X \$18 per week). Claimant was paid at two week intervals only in cash. Claimant kept no records regarding how much he was paid, his hourly rate, or the number of hours he worked. Other than an IRS 1099 form that indicated claimant received \$10,820 in "miscellaneous income" in the year 2010,⁴ claimant received no documentation from respondent regarding his hours or pay. Claimant paid no taxes on the earnings he received from respondent.

Jesus Gonzalez, owner of respondent, testified the only records he kept reflected hours an employee worked for the company and the hourly rate paid to that employee. Mr. Gonzalez corroborated claimant's testimony that respondent pays workers only in cash. He testified claimant was a full-time employee and that he usually worked on an average of 40 hours a week earning \$8 an hour or \$320 per week. Mr. Gonzalez was not able to produce the notebook he claims he maintained that documented claimant's hours worked and hourly wage.

The Board finds the testimony of Mr. Gonzalez is entitled very little, if any, weight. Mr. Gonzalez testified he maintained records, in the form of a notebook, documenting the hours employees worked and the hourly rate at which they were paid. Respondent produced no such records despite being deposed on two occasions. The only document offered into evidence by respondent was a 2010 1099 form showing a total of \$10,820 was paid by respondent to claimant in "nonemployee compensation." The undisputed evidence revealed claimant was paid by the hour and should accordingly have been provided with a W-2 form, not a 1099 form. Respondent stipulated the relationship of employer/employee existed between respondent and claimant on the date of accident.⁵

⁴ Gonzalez Depo. (Apr. 19, 2012), Ex. 1.

⁵ R.H. Trans. at 4.

The claim of Mr. Gonzalez that he did not produce the wage records because he “didn’t find them”⁶ is questionable given Mr. Gonzalez’ testimony that he provided the information from the records to his tax accountant, Alexandra’s Tax Service. If Mr. Gonzalez’ testimony is to be believed, he could easily have secured the information from the accountant and offered that information into evidence at one of his depositions.

It is noted respondent failed to comply with a subpoena duces tecum dated April 17, 2012⁷ and also did not comply with the provisions of K.A.R. 51-3-8(c) relating to pre-trial stipulations, which provides:

The respondent shall be prepared to admit any and all facts that the respondent cannot justifiably deny and to have payrolls available in proper form to answer any questions that might arise as to the average weekly wage. Evidence shall be confined to the matters actually ascertained to be in dispute. The administrative law judge shall not be bound by rules of civil procedure or evidence. Hearsay evidence may be admissible unless irrelevant or redundant.⁸

2. Claimant's sustained a 16% permanent impairment to his right leg.

K.S.A. 44-510d(a)(23) provides that loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the *AMA Guides*, if the impairment is contained therein.

The determination of the existence, extent and duration of the injured worker’s incapacity is left to the trier of fact.⁹ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.¹⁰

After considering and weighing the testimony of claimant and Mr. Gonzalez, and the expert medical opinions presented in this claim, the Board adopts and affirms the ALJ’s finding that Dr. Egea’s testimony is the most credible opinion regarding functional impairment. The reasons for finding the right leg impairment is 16% under the

⁶ Gonzalez Depo. (Apr. 19, 2012) at 9.

⁷ *Id.*, Cl. Ex. A.

⁸ See *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

⁹ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

¹⁰ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

circumstances of this claim are set out in the Award and it would serve no purpose to repeat them here.

The Board also adopts the finding of the SALJ claimant sustained an 18% permanent impairment to the left lower extremity as a consequence of the December 16, 2010, accidental injury.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹¹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the Board's decision that the Award of SALJ Gregory A. Lee dated August 22, 2012, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David J. Grummon, Attorney for Claimant
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¹¹ K.S.A. 2011 Supp. 44-555c(k).